NO. 356761

IN THE COURT OF APPEALS, DIVISION III
THE STATE OF WASHINGTON

POWER CITY ELECTRIC, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

OPENING BRIEF OF APPELLANT POWER CITY ELECTRIC, INC.

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I. INTRODUCTION

This matter arises from a Safety Citation & Notice (C&N) issued by the Department of Labor & Industries against Power City Electric, Inc. alleging trenching and excavation safety standard violations. The Industrial Appeals Judge Proposed that three of the four serious violations be vacated. On a Petition for Review, the Board reversed the Proposed Decision and Order and affirmed all serious violations. The employer, Power City Electrical, appealed to the Franklin County Superior Court which affirmed the Board's Decision & Order. Power City hereby files this appeal to the Court of Appeals alleging that as a matter of law the Board erred and that the Board's findings are not supported by substantial evidence in the record.

II. ASSIGNMENTS OF ERROR

Employer respectfully asserts that the Board of Industrial Insurance Appeals ("Board") and the Board and the Superior Court erred by holding that:

A. The Department met its burden of proving all prima facie elements required by RCW 49.17.180(6).

B. Item 1-2 should be affirmed even though the cited language applied only to trenches, but not excavations, and the excavation at issue was not a trench.

C. WAC 296-155-655(3)(b) applied even though the clear language of the regulation states that it only applies when the trench is four feet or more in depth; the excavation in question was clearly not more than four feet at the side where the employees got in and out.

D. The citations should be affirmed when the Department failed to establish that any of Power City Employees were exposed to a hazard that had a substantial probability of causing serious bodily injury or death as required by RCW 49.17.180(6).

III. ISSUES

A. Where the Department did not meet its burden of proving all prima facie elements required by RCW 49.17.180(6), did the Board and Superior Court err by affirming the alleged violations?

B. Where the cited language applied only to trenches, but not excavations, and the excavation at issue was not a trench, did the Board and Superior Court err by not vacating Item 1-2?

C. Even if the cited WAC applied, which it does not, where the clear language of the WAC 296-155-655(3)(b) only applies when the trench is four feet or more in depth, did the Board and Superior Court err when it affirmed Item 1-2 when the side where the employees got in and out was not more than four feet deep?

D. Where the Department failed to establish that any of Power City Employees were exposed to a hazard that had a substantial probability of causing serious bodily injury or death, the did the Board and Superior Court err by affirming the alleged violations?

IV. STATEMENT OF FACTS

This case arises from a drive by inspection on November 3, 2015. Gomez CP[1] 155, Lines 2 – 11. This was Power City's first day at this particular job site. McCarthy CP 259, Line 24 – CP 260, Line 4; Schelske CP 154. WISHA Compliance Safety Health Officer 3 Reynaldo Gomez testified that he was traveling eastbound on Court Street where he observed an excavation site taking place on the south side of Court Street. He testified that the speed limit was around 40 mph; he observed the top of a white hard had inside of the excavation. Gomez CP 220 lines 1-4.

[1] Clerk's Paper (CP)

Julian McCarthy was the foreman for Power City on the project. McCarthy, CP 258 Lines 12-13. Daniel Schelske was the site supervisor and track hoe operator on the project for Power City. Schelske CP 296 Line 10 – CP 297 Line 9.

As shown on page 2 of Exhibit 3, the right east bound lane was closed to traffic as the Power City Electric crew had placed a spoils pile in that lane. Traffic was diverted into the left lane of the east bound traffic. The two west bound lanes were not affected by the construction activities.

Officer Gomez went approximately 250-300 feet away from the excavation, parked his car and took the first photograph. Gomez CP 220 lines 14-21. The time stamp on the photograph was 1:43 pm, but he had not changed the camera from daylight savings time, so the actual time was 12:43 pm. (See Exhibit 10). Gomez CP 227 Line 22 – CP 228 Line 8. An enlarged view of the photograph number 3150 on the CD admitted as Exhibit 10 (CP 364), shows that the excavator operator is in the excavator cab, and that a Power City Electric employee is on the south side of the excavation. Officer Gomez testified that he saw a white hard hat next to the south side of the excavation when he first made his observation as he was driving by. Gomez Page CP 156 Line 1 – CP 157 Line 10.

After taking the first photograph, Officer Gomez saw another employee exiting the excavation from the south side. He did not take any photographs of any employees exiting the excavation. It took about a minute, perhaps less, for Officer Gomez to walk from his vehicle to the excavation site. Officer Gomez saw a small cutout in the excavation that the employees used to step out of the excavation. Gomez CP 160 Line 4 – CP 163 Line 11.

Officer Gomez testified that the deep end of the excavation, the north side, was a little bit more than six feet. This was the only measurement of the depth of the excavation that he took. Gomez CP 170 Lines 17-18. Mr. McCarthy stated that the south side of excavation was approximately 30 inches and was very hard to dig in the earth due to its compaction. McCarthy CP 274 Line 1 – CP 277 Line 4. Mr. McCarthy believed that the excavation was no deeper than 4 feet due to the depth that the fiber optic cable that the employees were hand digging was laid. McCarthy CP 294 Lines 5-23. Mr. McCarthy also testified that the excavation was 6 to 7 feet wide. McCarthy CP 279 Lines 3 – 20. Mr. Schelske testified that the excavation was 30 inches to 4 feet in depth and 6 to 7 feet wide as well. Schelske CP 320 Line 25 – CP 322 Line 23.

Officer Gomez testified that he saw footprints at the bottom of the excavation, but he never identified where in the excavation he saw the footprints, nor did he take any photographs to record his visual observations. Gomez CP 171 Lines 6-7. See also Exhibit 10 (CP 364)

Officer Gomez testified that he was aware that Power City Electric was an electrical contractor. However, he did not know what the specific task the Power City Electric crew was performing at the time of his inspection. Gomez CP 174 Lines 9-12. He further testified that he did not know what type of work they were doing and that he would have to defer to the workers as to why they were in the excavation and what they were doing. Gomez CP 234 Lines 3-14.

Officer Gomez took no photographs of the bottom of the excavation, nor did he provide any testimony whether the bottom of the excavation was uniform in depth. Gomez CP 234 Line 23 – CP 235 Line 1. The Department offered no other witnesses other than Officer Gomez.

Officer Gomez testified that he is not a Certified Safety Professional, Certified Industrial Hygienist, nor did he have any construction background. Gomez CP 219 Lines 2-8. He never testified that he actually saw anyone inside of the deep portion of the excavation. He did not know the thickness of the asphalt at the area where he measured the depth of the excavation, nor did he know the amount of dirt between the asphalt layer and the bottom of the excavation when he took the measurement of six feet. Gomez CP 243 Lines 16-18; CP 246 Lines 8-18.

Officer Gomez testified that at the time of his arrival, there was no trench box inside of the excavation. He did not see any ladders inside of the excavation. Officer Gomez did not take any photographs or video of the inside or the bottom of the excavation. See also Exhibits 3, 4, 8 and 10. Officer Gomez testified that due to its size, the excavation only needed one access point for egress. Gomez CP 247 Line 24 – CP 248 Line 2.

As Officer Gomez did not take any measurements on the south side of the excavation, he did not provide any testimony as to the depth of the excavation where he saw the employees get out of the excavation.

Mr. McCarthy testified that the work was for the Franklin County PUD. Their task was to re-route an underground high voltage line to another vault. Mr. McCarthy testified that the crew arrived around 8:00 A.M. Their

first task was to set up a game plan, and to see where the excavation should be dug. McCarthy CP 258 Line 12 – CP 261 Line 24; Schelske CP 298 Lines 13-23. They laid out the cut marks for a subcontractor to cut the asphalt. Mr. McCarthy testified that the depth of the asphalt on the north side of the excavation was about 8 inches, and that it tapered down to about 3 inches on the south side of the excavation. McCarthy Page CP 263 Line 3–CP 265 Line 9.

Mr. McCarthy also testified that based on utility locate services, there were other utility lines in the excavation area. Specifically, in the center, next to the high voltage power line, there were fiber optic conduits. These fiber optic lines typically have 2 feet of cover. That is, they are buried 2 feet down. However, in this application, they were a little bit deeper, around 30 inches. The high power electric line was next to the fiber optic lines. McCarthy CP 294 Lines 5 - 23. Mr. Schelske testified that by Washington code the telecommunications cables, which is what the fiberoptic cables were, half to be 24 inches down. Schelske CP 306 Lines 5-24. The National Electrical Code (NEC) requires all direct burial cables or conductors be covered with 24 inches of clean backfill unless specified conditions exist as provided in NEC Table 300-5 columns 2 through 5. The 2017 edition of the National Electrical Code (NFPA 70-2017) which was adopted by WAC 296-46B-010(1).

Mr. Schelske was basing his estimate of the depth of the excavation where the employees were working based on the fiberoptic cable depth. Schelske CP 320 Lines 5-11.

Dan Schelske testified that he was the excavator operator for the project. Schelske CP 296 Lines 7-19. He said that he was very good at excavating, but even he would not attempt to scrape dirt on top of the fiber optic cables. He testified that fiber optic cables were placed in two-inch diameter conduits and that they are very expensive to repair if broken. Schelske CP 332 Line 6- Page 192 Line 1. Thus, Curtis and Cody were on top of the fiber optic conduits, so they could hand dig out with shovels beneath the fiber optic cables to expose the high voltage power line that they needed to re-route.

As the Power City employees hand dug beneath the fiber optic cables, they threw the dirt to the north side of the excavation where Mr. Schelske could use the excavator bucket to scoop out the dirt. Mr. Schelske agreed that this portion of the excavation was about six feet deep. However, as he put on a one-foot bucket, the width of the excavation that was six feet deep was one foot wide. Schelske CP 324 Line 3 – CP 325 Line 3.

More importantly, Mr. Schelske testified that no one was in that deep end of the excavation where it was about six feet deep. Schelske CP 304 Lines 21-23; CP 324 Lines 18-19. No work was performed by Power City Electric in that area, there were no tools stored there, nor was the access or egress point anywhere close to the north side. Schelske CP 307 Line 2 – CP 308 Line 24. Rather, the two employees had always been on top of the fiber optic conduits where they spent approximately 15-20 minutes digging by hand in an area that was less than four feet deep. Schelske CP 330 Lines 5-20.

Mr. Schelske and Mr. McCarthy testified that the south end of the excavation was around 30 inches deep and that the employees were able to walk out of the excavation. Mr. Schelske never observed any workers attempt to climb out of the vertical walls on the west, north or east sides of the excavation, only on the south side. Schelske CP 308 Line 25 – CP 309 Line 5.

The excavation was sloped so that the employees had an easy means of ingress and egress. Mr. Schelske testified:

> Q: Did you ever see how the employees who were inside of the trench get out of the excavation?
>
> A They could actually put their knee on top of the curb and walk out.
>
> Q. Okay. What side of the – oh, you said on the curb?
>
> A. Excuse me?
>
> Q. Did you say curb?
>
> A. Yeah. Well, you got, you got the curb. And then you got the 6-inch shelf or whatever it is. So you could actually kneel on that and get out. I mean, it's a, walk out, if you wanted to. It wasn't that deep. It was probably 30 inches, maybe.

Schelske CP 308 Line 25- CP 309 Line 11.

Mr. Schelske testified that based on his observations, it was easy for the workers to get out of the excavation. Schelske CP 309 Lines 17-21. Mr. Schelske testified that the south side of the excavation was 30 inches ***or less***. Schelske CP 322 Lines 2-6, ***emphasis added.***

Mr. Schelske further testified that Curtis built a step into the excavation by putting in a notch as the soil was so hard at that point. Schelske CP 309 Line 24 – Page 169 Line 4.

This was Power City's first day of work at this part of the project. McCarthy Page 118 Line 24 – CP 310 Line 1. They had started digging the excavation that morning. McCarthy CP 261 Line 6 – CP 264 Line 25. The employees where digging with shovels in the excavation because of the fiberoptic cables. These were approximately 30 inches down. This was an exploratory/investigation step to discover and uncover the fiberoptic conduit. Schelske CP 326 Line 3 – CP 328 Line 21. The soil in this area was very hard to dig due to its compaction. McCarthy CP 274 Line 1 – CP 277 Line 4. Mr. Schelske testified that the employees had to use pick axes at one point because the soil was so compacted. Schelske CP 308 Lines 4-7. Mr. Schelske also stated that the soil was so compact and compressed "it was almost like hard pan." Schelske CP 310 Lines 3-6. Officer Gomez was not aware of any changes in circumstances from the time the Power City Electric crew first entered the excavation to the time of the DOSH inspection. There was no testimony that there were any changes in the conditions which were identified by the competent person.

Mr. Schelske testified that he had never seen anything ravel into the excavation, and that even if it did, there were no employees in the area where they could be hit by any debris from the spoils pile. That is, the spoils pile was located at the north end of the excavation, an area where Power City Electric's employees did not work and had no reason to access. Officer Gomez testified that the photographs in Exhibit 6 were representative of the spoils pile. Officer Gomez did not dig under the top layer of the spoils pile to determine if the soil was any different than what he observed. Officer

Gomez testified that there were no rocks or boulders, and that he saw no rocks that were greater than three inches in diameter or longer than four inches. Gomez CP 230 Lines 1-23. Rather, he testified that the soil composition was sand. Officer Gomez did not know the weight of the spoils pile, nor did he measure the lateral distance from the north end of the excavation to the peak of the spoils pile. Gomez CP 231 Line 2 – CP 233 Line 15, CP 243 Line 23 – CP 244 Line 1. Mr. Schelske testified that it was better than 1 ½ to 1 ratio, and that the soil was less than one foot deeper within 2 feet of the edge of the northern side of the excavation. Schelske CP 310 Line 14 – CP 311 Line 6.

Mr. Schelske testified that the spoils pile was sloped at better than a 1 ½ to 1 ratio, and that it was stable soil. Officer Gomez further testified that he did not observe any fissures or evidence that the stability of the soil or its conditions had changed from the time employees first entered to the time of his inspection. Gomez CP 248 Line 6 – CP 249 Line 3.

As set forth in the Citation & Notice, the Department alleged four serious citations (two citations were grouped):

Item 1-1a "Serious" WAC 296-155-657(1)(a) Penalty $3,6000.00

> The Employer did not ensure that employees were protected in an excavation from cave-ins. One employee was working in a depth greater than 4 feet without adequate protective system.

CP 344.

Item 1-1a was vacated in the PD&O by the Industrial Appeals Judge (hereinafter "IAJ") but reinstated by the Board. CP 67 and CP 11.

Item 1-1b "Serious" WAC 296-155-655(11)(B) No Penalty was assessed because it was grouped with Item 1-1a.

> The employer/competent person did not conduct an inspection to find evidence of a situation that could result in possible cave-in and did not remove employees from hazardous area until the necessary precautions had been taken to ensure their safety.

CP 344.

Item 1-1b was vacated in the PD&O by the IAJ but reinstated by the Board. CP 67 and CP 11.

Item 1-2 "Serious" WAC 296-155-655(3)(b) Penalty $1,800

> The Employer did not ensure that the employees working in the trench/excavation were provided a safe means of access or egress, two employees were in a [sic] excavation greater than 4 feet deep.

CP 345.

The Employer respectfully asserts that this item should have been vacated as it was undisputed that it was less than 30 inches deep at the southern side of the excavation where the Compliance Officer observed the two employees exit the excavation.

Item 1-3 "Serious" WAC 296-155-655(10)(b) Penalty $1,800

> The employer did not ensure that employees were protected from excavated or other materials that could pose a hazard by falling or rolling into the excavation by placing and keeping such materials at least 2 feet from the edge of excavations.

CP 345.

This Item was vacated in the PD&O by the IAJ but reinstated by the Board. CP 67 and CP 11.

V. ARGUMENT

A. Standard of Review

The standard of review under the Washington Industrial Insurance and Safety and Health Act (hereinafter "WISHA") is set forth in RCW 49.17.150(1). In a WISHA appeal, the courts directly review the Board's decision based on the record before the agency. *See J.E. Dunn Northwest., Inc. v. Dep't of Labor & Indus*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007).

The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole. RCW 49.17.150; *Mowat Constr. Co. v. Dep't of Labor & Indus*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr.*, 148 Wn. App. At 925.

However, statutory interpretations for questions of law are reviewed by the appellate courts de novo. *See Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *See Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *See The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

B. There was no substantial hazard that Power City Electric Employees were exposed to that had a substantial probability of causing serious bodily injury or death.

For Items 1-1a and 1-1b, the Compliance Officer alleged that soil caving in constituted the hazard. As clearly set forth in the cited regulation, Employers must take adequate protective measures when the excavation is deeper than four feet. There are exceptions. No protective measures are required if the excavation is in solid rock or if the excavation is less than four feet deep.

> The cited safety standard for Item 1-1a provides:
>
> **WAC 296-155-657(1)(a) Requirements for protective systems.**
>
> (1) **Protection of employees in excavations.**
>
> (a) You must protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with subsections (2) or (3) of this section **except when**:
>
> (i) Excavations are made entirely in stable rock; or
>
> **(ii) Excavations are less than 4 feet (1.22m) in depth** and examination of the ground by a competent person provides no indication of a potential cave-in.
>
> (b) Protective systems must have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system.

The purpose of the above safety standard is clear: If more than four feet of soil caves in on a worker, the worker may be seriously injured or killed by being crushed, or asphyxiated, or both. The exceptions are also equally clear: stable rock is not likely to cave in; and, less than four feet of

soil is not likely to cause serious injury or death. As such, employers are not required to take protective action under either of these two exceptions.

In order to establish that any Power City Electric employee was exposed to the hazards set forth in Item 1-1, the Department must establish that there was a hazard of more than four feet of soil caving in. In our present case, the Compliance Officer only had evidence that the employees were at the south end of the excavation. He did not measure the depth of the excavation or provide any testimony that the depth of the excavation was uniform in depth. On the other hand, Mr. McCarthy and Mr. Schelske testified that the south end was about 30 inches deep, and that both Curtis Cromer and Cody Stratton were never in the deep end of the excavation. Rather, they were at the fiber optic lines hand digging and throwing the dirt by the north side of the excavation so that it could be scooped out by Mr. Schelske using the excavator.

Not only did Officer Gomez take no photographs, he also did not provide any testimony where the footprints were in the bottom of the excavation. Mr. Gomez, who has no background in construction[2], had no idea what task was being performed, let alone what was necessary to accomplish the task. His opportunity to observe the alleged hazard was for a brief moment in time when he was driving at 40 mph going east bound on Court Street, his view was blocked by the spoils pile, and his own testimony

[2] Prior to becoming an inspector, Officer Gomez worked in the Fraud Department for the Department of Labor & Industries and as a police officer. Gomez Page 9 line 22- Page 10 Line 16.

placed the employees at the south end of the excavation and not the north end.

It is inconceivable that a CSHO supervisor would fail to take more than one measurement of the depth of the excavation and take no photographs of the area he claimed to be hazardous to the employees. The Department's case was woefully inadequate to meet its burden of proving both the existence of the violation (i.e., exposure to a serious hazard) and the basis for a serious violation (i.e., a hazard that has a substantial probability of causing serious bodily injury or death).

The undisputed testimony was that the excavation had started that day. It is also undisputed that the employees were hand digging to expose the fiber optic conduits that were buried at approximately 30 to 36 inches (or 3 feet in depth). The employees were not working at an excavation of 4 feet or greater and were not exposed to any hazards.

The Board relied on *Mid Mountain Contractors, Inc. v. Department of Labor & Industries*, 136 Wn. App 1 (2006) in reversing the IAJ's dismissal of item 1-1a of the citation. In *Mid Mountain,* the court of appeals stated that the standard was:

> To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show that the [worker] had access to the violative conditions. To establish employee access, **the Department must show** by **"reasonable predictability** that in the course of [the workers'] duties, employees **will be, are, or have been** in the zone of danger."

Mid Mountain, supra, 136 Wn.App. at 5, internal footnotes omitted, **emphasis added.**

The zone of danger is based on the normal duties in the normal work area. *Id* at 7; *Adkins v. Aluminum Co. of America,* 110 Wn.2d 128 (1988). It is important to note that in *Mid Mountain,* the court noted that the employer failed to challenge most of the Board's findings of fact. *Id* at 4. The only facts in the finding of *Mid Mountain,* was that the employees were working more than five feet away from a section of the trench that was in violation of the WAC, that the soil was Type B and that the zone of danger was the area within four feet six inches from the south wall of the trench. *Id* at 5-6.

Unlike *Mid Mountain,* we have testimony that the employees here had a very discrete objective, to uncover the fiberoptic cable that was buried between 30-36 inches below the asphalt. While the 6-foot area was not barricaded, the uncontroverted testimony from Mr. Schelske was this was a very discrete area. While the area the employees were working in was an excavation area of 10-foot length and 6 to 7 feet in width, the area where Mr. Schelske was removing the spoils was only 1 foot wide, or the width of the bucket. The Department did not present any testimony to contradict this testimony. This reduced width provided a visual barrier. There were no tools or material stored in the area or tasks that needed to be performed in the 6 – 7 foot area where the excavator was removing the dirt the workers scraped from the fiber optic conduit and tossed to the north side of the excavation for removal by the excavator. Mr. Schelske also testified he was observing the employees in the excavation performing the hand digging and was running the excavator. He prohibited them from entering the deep area of the excavation. As such, it was not reasonably predictable that anyone

would enter the "zone of danger" or have any reason to do so. Moreover, seasoned and experienced construction workers would stay clear of the path of the moving excavator bucket. Nor was any testimony presented by the Department that anyone was actually in the "zone of danger." To the contrary, the testimony from Mr. Schelske was that no one had entered the deep end of the excavation.

Officer Gomez did not know what the Power City employees were doing, had no background in construction and would have to defer to the workers as to why they were in the excavation and what they were doing. As such, the Department failed to show what Power City's employees' normal duties were. By failing to show what the normal duties were, the Department also failed show by any reasonable predictability that in the course of their duties, the Power City employees were in the zone of danger, or would reasonably put themselves in the zone of danger.

In his PD&O, dismissing 1-1a, 1-1b and 1-3, the IAJ noted that the holding in *Mid Mountain* requires that the workers' "normal duties" require the employees to enter into the zone of danger. Judge Bolong found that the normal duties for Power City's employees at this point in time was only to uncover the fiber optic conduit where the excavation was 30 inches deep. CP 63. The IAJ further noted that the workers were not working near the hazard area, were aware that they should not enter the hazard area and did not have access to that side of the excavation. Based on those facts, the IAJ held that the Department had not met its burden in showing that there was a substantial probability that death or physical harm would result. CP 63–65.

For Item 1-1b, WAC 296-155-655(11)(b) states:

> (11) **Inspections.**
>
> (a) Daily inspections of excavations, the adjacent areas, and protective systems must be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection must be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections must also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.
>
> (b) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, you must remove exposed employees from the hazardous area until the necessary precautions have been taken to ensure their safety.
> WAC 296-155-655(11)(b).

The competent person for trenching and excavations, Dan Schelske, testified that he observed the excavation that he dug to make sure that it was safe to enter. The undisputed testimony showed that the excavation was dug that morning, starting with the marking of the utilities and cutting of the asphalt around 8:30 to 9:00 am. There were no occurrences or weather conditions which dictated the need to remove the employees from the excavation. Both Mr. McCarthy and Mr. Schelske testified that the soil underneath the asphalt was compacted and hard to dig. Mr. Schelske even referred to the soil as being like hard pan.

Likewise, for Items 1-2 and 1-3, the Department woefully failed to establish all prima facie elements needed to show a serious violation. For Item 1-2, the WAC 296-155-655(3)(b) states:

> (3) **Access and egress.**
>
> (b) Means of egress from trench excavations. **A stairway, ladder, *ramp or other safe means* of egress must be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.**
>
> WAC 296-155-655(3)(b) ***emphasis added.***

Although ladders may be a common way to provide a safe means of access and egress, it is clearly not the only method available to employers. Rather, a ramp or other safe means of egress may be used if the excavation is greater than four feet in depth.

In our present case, the employees had to travel less than 25 feet to get to the south side of the excavation that was about 30 inches deep, and shallow enough for the employees to freely walk out the excavation. The Department presented no evidence to refute the testimony of Mr. McCarthy and Mr. Schelske on the depth of the southern end of the excavation. Officer Gomez agreed that only one egress point was necessary.

For Item 1-3, WAC 296-155-655(10)(b) states:

> (10) **Protection of employees from loose rock or soil.**
>
> (b) You must protect employees from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection must be provided by placing and keeping such materials or equipment at least two feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

WAC 296-155-655(10)(b).

Here, Mr. Schelske testified that he had never seen anything ravel into the excavation, and that even if it had, there were no employees in the north end of the excavation where they could be hit by any debris from the spoils pile. Additionally, the evidence did not suggest that employees had any reason to go into the north end of the excavation, as Power City Electric was not performing any work in that area, there were no tools stored in that area, nor was the access or egress point anywhere close to that area.

The Department cannot establish that any employee was exposed to a hazard that had a substantial probability of causing serious bodily injury or death. To establish employee exposure to a violative condition, the Department must prove that it was reasonably predictable that either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, employees will be, are, or have been in a zone of danger. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1073-1074 (NO. 93-1853, 1997). The Department must also establish employee exposure to a serious hazard which creates a substantial probability of causing serious bodily injury or death. RCW 49.17.180(6). With regards to the statutory language, "could cause serious bodily injury or death," the OSHRC held in *Rockwell International Corp, 80 OSAHRC 118/A2, 9 BNA OSHC* 1092, for employee exposure the Secretary must prove more than just the possibility an employee may get injured.

Under federal OSHA cases, the Secretary must prove that such an event may well occur given the circumstances surrounding the worksite, such as the method of operation, the method of handling and the speed of the equipment. For instance, in *Secretary of Labor v. Fabricated Metal Products, Inc.*, OSHRC Docket No. 93-1853, a machine guarding case, the Secretary found that it was not reasonably predictable that an employee would be in the zone of danger presented by the press points of operation at any time. As such, the citation item *Fabricated Metal* was vacated as the CSHO believed that there could be exposure to a hazard only through an

inadvertent entry due to a slip or fall. The Administrative Law Judge agreed that it was highly unlikely that an employee would slip or fall in such a way to constitute employee exposure. Similarly, in *Secretary of Labor v. Tricon Industries, Inc.*, 24 BNA OSHRC 1427 (No. 11-1877, 2012), a fall protection case, the evidence established that the only task that the employees were performing was screen and layout work near the center of a deck. During the course of their work, employees would approach no closer than twelve feet from an unguarded edge, although in one instance an employee approached a welder that was no closer than six to seven feet from the unguarded edge. The Administrative Law Judge determined that the Secretary failed to establish that Tricon employees were in the zone of danger because there was no evidence to suggest that it was reasonably predictable that employees had any reason or occasion to wander around the deck, or that in the course of their assigned working duties or their personal comfort activities while on the job, they would come any closer to the edge of the deck. *Id.*; *See also Secretary of Labor v. Fastrack Erectors*, 21 BNA OSHC 1109 (No. 04-0780, 2004) (determining that the record failed to show that the employees were exposed to a fall hazard when the testimony established that employees were never closer than 6 feet from the edge and there was no reason for the employees to be closer than 6 feet from the edge).

C. The excavation in question was an excavation, but not a trench. As such, the cited WAC does not apply for Item 1-2.

For Item 1-2, the Department failed to demonstrate that the cited code applied to an excavation. The Department further failed to establish all prima facie elements needed to show a serious violation. To meet its burden

and establish a prima facie case, the Department must prove: 1.) **the cited standard applies;** 2.) the requirements of the standard were not met; 3.) employees were exposed to, or had access to, the violative condition; 4.) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and 5.) there is substantial probability that death or serious physical injury that could result from the violative condition. *Washington Cedar & Supply Co., Inc. v. Dept. of Labor & Industries,* 119 Wn.App. 906, 917 (2003) **emphasis added**. As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company,* 110 Wn.2d 128, 147 (1988). Federal case law is similar to RCW 49.17.180(6).

For Item 1-2, the WAC 296-155-655(3)(b) states:

> (3) **Access and egress.**
>
> (b) Means of egress from **trench** excavations. **A stairway, ladder, *ramp or other safe means* of egress must be located in trench excavations *that are 4 feet (1.22 m) or more in depth* so as to require no more than 25 feet (7.62) of lateral travel for employees.**

WAC 296-155-655(3)(b) Emphasis ***added.***

The clear language of the cited regulation demonstrates that it applies only to ***trench*** excavations that are more than four feet deep. It does not apply to excavations. The stated purpose of WAC 296-255-655(3)(b) is to ensure that an employee does not have to travel more than 25 feet to get out of a trench that is more than 4 feet deep. That is, if the exit point of the trench is greater than 4 feet deep, regardless of the depth of the trench on the other side, a ladder or other means of safe egress must be provided

to allow the employees to freely exit the trench.

An excavation is defined in WAC 296-155-650 as "[a]ny person-made cut, cavity, trench or depression in the earth's surface, formed by earth removal."

A trench excavation is defined in WAC 296-155-650 as:

> **Trench (trench excavation).** A narrow excavation in relation to its length made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6m).

An "excavation" that is not a trench is defined in WAC 296-155-650(2) as:

> **Excavation.** Any person-made cut, cavity, trench, or depression in the earth's surface, formed by earth removal.

In the case at bar, the depth of the excavation dug by the Employer was not greater than the width. Officer Gomez never measured the width. He measured the deepest part which was only 6 feet. The depth was not symmetrical and ranged from 30 inches on the south end to 6 feet on the north. The width on the other hand was constant and was 6 to 7 feet. As such, the depth was not greater than the width. As such, the excavation in the present case is an excavation, but it is not a trench excavation as defined in WAC 296-155-650. Accordingly, the WAC 296-155-655(3)(b) is not applicable to excavations that are not defined as a "trench excavation."

Based on the undisputed testimony, the dimensions of the excavation demonstrate that it was an excavation, but that it did not meet the definition of a "trench" or a "trench excavation." As such, the cited standard does not apply.

In upholding the citation, the Board erroneously concluded that all excavations are trenches. CABR 4. This is false. While all trenches by definition are excavations, not all excavations are trenches. "Trench excavations" are a subset or a specific and discrete type of excavation.

In confusing the terms ("trench excavation" and its abbreviated version "trench" with "excavation") the IAJ, in discussing the citation, stated that:

> WAC 296-155-655(3)(b) states the employer must provide a safe means of egress when entering and exiting a **trench** 4 or more feet in depth, and within 25 feet of lateral distance in the trench. Here, the cited standard applies because the **trench** was more than 4 feet in depth in some areas. The Employer did not have a stairway, ladder or ramp located in the **trench excavation.** What they did have was a ledge or notch cut into one side of the **excavation.**

CP 64 Lines 19- 25 emphasis **added.**

The burden is on the Department to prove that the code applies. *Olympia Glass Company,* 95 W0455, *J.E. Dunn Northwest, Inc. v. Dept. of Labor & Indust.,* 139 Wn. App 35, 44, 156 P.3d 250 (2007); *Washington Cedar & Supply Co. v. Dept. of Labor and Indust.,* 137 Wn.App. 592 602, 154 P.3d 287 (2007). In addition, the Board confuses the terms "trench" and "trench excavation" with "excavation." These terms have different meanings in the regulatory definitions.

Agency regulations are interpreted as if they are statutes. *Roller v. Dept. of Labor & Indust.,* 128 Wn.App. 922, 926-927, 117 P.3d 385 (2005) (quoting *Cobra Roofing Serv., In v. Dept. of Labor & Indust.,* 122 Wn.App. 402, 409, 97 P.3d 17 (2004) When interpreting a statute, courts first look at its plain language. *State v. Armendariz,* 160 Wn.2d 106, 110 156 P.3d 201

(2007). If the plain language is subject to only one interpretation, the inquiry ends because plain language does not require construction. *Id.* "Where statutory language is plain and unambiguous, a statute's meaning must be derived from the working of the statute itself." *Washington State Human Rights Comm'n v. Cheney Sch. Dist. No. 30,* 97 Wn.2d 118, 121, 641 P.2d 163 (1982). Absent any ambiguity or a statutory definition, Washington courts are to give words in a statute their common and ordinary meaning. *Garrison v. Washington State Nursing Bd,* 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "A statute that is clear on its face is not subject to judicial construction." *State v. J.M.,* 114 Wn.2d 472, 480, 28 P.3d 720 (2001). Here the WAC is clear that states that "[a] **stairway, ladder*, ramp or other safe means* of egress must be located in trench excavations *that are 4 feet (1.22 m) or more in depth* so as to require no more than 25 feet (7.62) of lateral travel for employees."** WAC 296-155-655(3)(b), ***Emphasis added.*** While this was an "excavation it was not a "trench excavation" and as such, the code does not apply.

D. Even if the excavation in question was also a trench, which it was not, the cited WAC still does not apply because it was less than four feet where the workers egressed.

Not only does the cited regulation not apply to the excavation in question, even if it were a trench excavation (which it is clearly not), it is also not deeper than 4 feet. The clear language of the cited WAC specifies that when the trench is more than four feet deep, a safe means of egress must be made available within 25 feet of travel. The Compliance officer took no measurements of the south side of the excavation, even though he

testified that he observed two employees get out of the south side of the excavation. Mr. Schelske testified that it was 30 inches or less. He testified that Curtis had put in a notch to help him walk out, and that it was easy for the workers to get out.

Although ladders may be a common way to provide a safe means of access and egress, it is clearly not the only method available to employers to satisfy the code. Rather, a ramp or other safe means of egress may be used if the excavation is greater than four feet in depth. In the case at bar, putting a notch inside of the south side of the excavation was an acceptable means of egress, even though it was technically not required.

In the case at bar, the employees had to travel less than 25 feet to get to the south side of the excavation that was approximately 30 inches deep, shallow enough for the employees to freely walk out of the excavation.

The Department failed to establish that any employee was exposed to the hazards of not being able to freely exit the excavation in question. Just as there was no employee exposure for Items 1-1a, 1-1b and 1-3 The Board should have concluded that the cited WAC did not apply, or that there was no employee exposed to any hazard of ingress or egress into the excavation.

E. The Department failed to establish knowledge as required by RCW 49.17.180(6).

Even if the Department established non-compliance with the articulated standards, that is not sufficient as the Department still must establish employer knowledge of the alleged violation. RCW 49.17.180(6). Employer knowledge of a non-complying action or condition is a fundamental element of the Department's burden of proof establishing a

violation of a WAC. RCW 49.17.180(6). See also, *Trinity Industries v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000).

To meet its burden and establish the element of knowledge, the Department must show that the employer knew of, or with the exercise of reasonable diligence should have known of, the non-complying condition. See *Id*. Proof of an employer's failure to comply with a specific regulation, even when coupled with substantial danger, is not by itself enough to establish a violation under the Act. See *Horne Plumbing & Heating Co., v. OSHRC*, 528 F.2d 564, 568-569 (5th Cir. 1976) (emphasis supplied).

In drafting the Act, "Congress quite clearly did not intend…to impose strict liability: the duty was to be an achievable one." *W.G. Yates & Son v. Occupational Safety & HLT*, 459 F.3d 604, 605 (5th Cir. 2006) (Citing to *Horne Plumbing & Heating Co., supra*, 528 F.2d at 568). The Act, as it was intended to be applied, sought to require employers to protect against preventable and foreseeable dangers to employees in the workplace. *Id* at 607.

If direct knowledge of the employer is not demonstrated by the Secretary, then it is the burden of the Secretary to show that the employer's lack of knowledge was the result of a failure to exercise reasonable diligence in the matter. See *Trinity Industries*, F.3d 539 at 542.

The Board has also held that there is no strict liability under WISHA. See *In Re: Traffic Control Services*, Dkt. No. 06-W0021, 2007 WL 3054890 (Wash. Bd. Ind. Ins. App.) (2007) (vacating a citation due to trained flagger's unforeseeable unsafe act): "WISHA does not impose strict liability on employers."

As IAJ Timothy Wakenshaw observed in vacating an unforeseeable event:

> "Finally, I would note that, as a matter of policy, **the law should not add and does not allow a regulatory agency to prove the existence of a violation of a general safety standard by the fact of an accident**, and the investigation and actions taken by the company after the fact. See *In re Longview Fibre Company*, Docket No. 02 W0321, (November 5, 2003), ER 407, *Brennan v. OSHRC and Canrad Precision Industries*, 2 OSCH 1137, 1140 (3rd Circuit Ct. of App.) (1974), and *T. Fleming, Admissibility of Evidence of Repairs, Change of Conditions, or Precautions Taken after Accident, Modern Safety Cases*, 15 ALR 5th 119, (2005). If allowed, this would discourage employers from taking appropriate action following incidents like this one, and that is clearly not what the law intended." (emphasis supplied)

In re: Tesoro Refining & Marketing Co., Dkt. No. 05-W0148 (IAJ Timothy Wakenshaw, Aug. 11, 2006) (Order Denying Dept.'s Petition for Review Sept. 26, 2006), aff'med. Skagit Co. Superior Case No. 06-2-02040-8 (Judge Michael E. Rickert, Sept. 19, 2008).

Proving employer knowledge is a strict obligation of the Department as part of its *prima facie* case. *Brock v. L.E. Myers Co*., 818 F.2d 1270 (6th Cir.) cert. denied, 484 U.S. 989 (1987). See, also, *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32, 053, p.48,003 (No. 96-1719, 2000) (Secretary bears burden of proof on actual or constructive knowledge). The Review Commission and courts have consistently held that knowledge is an essential element of the Secretary's burden of proof. See *Secretary of Labor v. Milliken & Co*., 14 BNA OSHC 2079, 2080, 2082-2084 (Rev. Comm. 1991) *affirmed sub nom, Secretary of Labor v. OSHRC* and *Milliken & Co., 947* F.2d 1483, 1484 (11th Cir. 1991*),*

Secretary of Labor v. General Electric Company, 9 BNA OSHC 1722, 1728 (Rev. Comm. 1981). This obligation cannot be ignored or shifted away from the Department.[3]

WAC 263-12-115 "Procedures at hearings" provides that, "In all appeals subject to the provisions of the Washington Industrial Safety and Health Act, the Department shall initially introduce all evidence in its case-in-chief." *In re Savage Enterprises, Inc.*, BIIA Docket No. 86-W053 (1988) concerned a Corrective Notice of Redetermination that alleged a serious violation of WAC 296-62-07517 and declared that '[t]he Department of Labor and Industries has the burden of establishing all of the elements necessary to prove a violation of the cited standard. WAC 263-12-115(2)(b)."

In *Trinity Industries, Inc. v. Occupational Safety and Health Review Commission*, 206 F.3d 539, (5th Cir. 2000), the Fifth Circuit of the US Court of Appeals held that under 29 USC 666(k), the Secretary has the initial burden of proving all prima facie elements. With regard to the requisite element of knowledge, the court held at page 542:

> To prove the knowledge element of its burden, the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition.

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[3] The Department of Labor & Industries' administrative code regarding its burden of proof in WISHA cases is consistent with the above cited federal case law.

In *Trinity,* the Secretary alleged that a contaminant was above the Permissible Exposure Levels. However, because the employer demonstrated that it had made measurements and determined that the concentration was not excessive, the burden was on the Secretary to show that the employer's failure to discover the excessive concentration resulted from a failure to exercise reasonable diligence.

To impute knowledge to an employer of an alleged hazard, the hazard must be specifically known to the employer — "it is not enough to find that a condition contravening that standard existed in the employer's workplace. In federal OSHA cases, the Secretary must also prove that the employer either knew or could have known with the exercise of reasonable diligence of the **noncomplying condition**." (emphasis added) *Dunlop v. Rockwell International*, 540 F.2d 1283 [4 OSHC 1606] (6th Cir. 1976); *Alsea Lumber Co.*, 511 F.2d 1139 [2 OSHC 1649] (9th Cir. 1975); *Prestressed Systems, Inc*., OSHRC Docket No. 16147 [9 OSHC 1864]; *Scheel Construction Co.*, 76 OSAHRC 138/B6, 4 BNA OSHC 1825. From jobsite to jobsite the potential hazards can vary greatly and, for those various potential hazards, there can be multiple means of protective measures available.

In *Brennan v. Occupational Safety and Health Review Commission*, 511 F.2d 1139 (9th Cir. 1975). The Ninth Circuit expressly held:

> A serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Id. at 1142.

> The Secretary has at least the initial burden of establishing a prima facie case of employer knowledge before the burden of going forward shifts to the employer.

Id. at 1143.

> **Not requiring the Secretary to establish that an employer knew or should have known of the existence of an employee violation would in effect make the employer strictly and absolutely liable for all violations and would render meaningless the statutory requirement for employee compliance**. … Congress intended to require elimination only of preventable hazards.

Id. at 1145, **Emphasis added.**

The Ninth Circuit's holding in *Brennan* has been adopted by the 3rd, 4th, 5th and 10th Circuit Courts of Appeal.

In *Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Commission*, 737 F.2d 350 (3rd Cir. 1982), the Court held:

> The prevailing view among the circuits is that the employer's knowledge or ability to discover a violation is an element of the Secretary's case-in-chief… Employers should be encouraged to develop work rules that will reasonably respond to their particular working conditions and safety needs. An employer's safety rules should be evaluated with that end in mind, and not with the myopic view toward literal conformance with OSHA regulations.

Id. at 358.

In *L.R. Wilson & Sons, Inc. v. Occupational Safety & Health Review Commission*, 134 F.3d 1235 (4th Cir. 1998), the Court held:

> Burden-shifting was found to be in direct contravention of previous rulings and the court reversed the Commission's decision finding imputed knowledge of a violation due to a "lead man" position cannot place the burden of "good faith efforts squarely on the employer.

Id. at 1240.

In the case at bar, the foreman in charge of the project was Julian McCarthy. It is undisputed that he had left the job site temporarily and was not present when Officer Gomez stopped and conducted the opening conference. Moreover, Mr. McCarthy was not present at the time the Department alleges that the employees were exposed to serious hazards inside of the excavation. Thus, absent actual knowledge, the Department must establish that the Employer failed to exercise due diligence.

The Department offered no evidence as to the nature or extent of actions an Employer must take at a construction site. Without establishing the threshold requirements, the Department cannot blindly assert that Power City failed to exercise due diligence. The Employees were trained on excavations, the competent person had inspected the excavation before allowing anyone to enter. Both the competent person, Mr. Schelske, and Mr. McCarthy testified that the excavation was dug that day and that the soil underneath the asphalt was very compact and hard. Officer Gomez only felt the soils in the spoils pile. Moreover, as established in the previous sections, the Department failed to establish any underlying violation. There is no evidence in the record provided by the Department that discusses the topic of due diligence or the Employer's failure to exercise it.

VI. CONCLUSION

Here, the Department failed to meet its burden of proof that the Employer did not comply with terms of the cited regulations or that any employee was exposed to a serious hazard, as it was not reasonably predictable that employees would be, were, or had been in the zone of

danger. First, in regard to Item 1-1, the record establishes that Officer Gomez did not know what specific task the Power City Electric crew was performing at the time of the inspection. Moreover, Officer Gomez never testified that he actually saw anyone inside of the deep portion of the excavation, and he never testified that he saw anyone attempt to get out of the excavation of the west, north, or east sides. Mr. Schelske, however, testified that no one was in the deep end of the excavation where it was about six feet deep because Power City Electric was not performing any work there, no tools were stored there, nor was the access or egress point anywhere close to that side of the excavation. Rather, Mr. Schelske testified that the two Power City Electric employees had always been on top of the fiber optic conduits in an area that was less than four feet deep.

In regard to Item 1-2, the record establishes that Power City Electric's employees were able to safely walk out of the south side of the excavation, and Power City Electric's employees were never observed attempting to climb out of the vertical walls of the west, north, or east sides of the excavation.

As to Item 1-3, Mr. Schelske testified that he had never seen any dirt fall into the excavation from the spoil pile. The spoils pile was sloped 1:1.5. Even if it did, there were no employees in the north end of the excavation where they could be hit by any debris from the spoil pile. That is, the record establishes that there was no reason for Power City Electric's employees to be in the north end of the excavation, as Power City Electric had no work to be performed in that area, there were no tools stored there, the employees were aware that they were not to be in that area, the competent person was watching that area, and the access and egress point was not located anywhere near the north end of the excavation.

Overall, it was not reasonably predictable that any of Power City Electric's employees were exposed to any of the alleged violations. Similar to workers inside of a trench box, the workers are safe so long as they do not step out of the trench box. However, as soon as the workers step out of the trench box, it is reasonably predictable that they are exposed to a hazard. That is, just because it may be possible that workers can gain access to a hazard, it does not mean that it is reasonably predictable that employees will be exposed to a hazard.

For the aforementioned reasons, the Department cannot establish that it was reasonably predictable that employees were exposed to a hazard because there was no reason or occasion for Power City Electric's employees to go into the deep end of the excavation, or that in the course of their assigned working duties or their personal comfort activities while on the job, they would be exposed to any of the alleged violations.

For all of the reasons set forth above, the Employer respectfully urges the Court to reverse the Findings and Conclusions of the Board and vacate the citation in its entirety.

Respectfully submitted this 29th day of January 2018.

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CERTIFICATE OF SERVICE

I certify that on January 29, 2018, I caused the original and copy of the **Employer's/Appellant's Opening Brief** to be filed via Electronic Filing, with the Court of Appeals, Division III, and that I further served a true and correct copy of same, on:

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